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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 79

LEHIGH VALLEY COOPERATIVE FARMERS, INC., AND SUNCREST FARMS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA

BRIEF OF THE STATE OF MINNESOTA, AMICUS CURIAE

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BRIEF OF THE STATE OF MINNESOTA, AMICUS CURIAE

Pursuant to Rule 42 (4) of the rules of this Court, the State of Minnesota respectfully tenders this brief, amicus curiae in support of the position of the petitioners Lehigh Valley Cooperative Farmers, Inc., and Suncrest Farms, Inc.

I. QUESTIONS PRESENTED

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. § 601 et seq., (hereinafter referred to as the Act) authorizes the Secretary of Agriculture to define and regulate milk marketing areas through the adoption of marketing orders requiring distributors or "handlers" to pay to producers minimum prices for all milk sold in the regulated area. The terms and conditions of a milk order are expressly limited by the provisions of §§ 8c(5) and 8c(7) of the Act. Certain provisions of New York - New Jersey milk marketing order,

7 C.F.R. § 927.1 et seq. (hereinafter referred to as Order No. 27) impose a charge on all milk distributed by petitioners in the area regulated by Order No. 27 for payment to "producers" other than the dairy farmers who supplied the milk. The questions presented are:

1. Whether 7 C.F.R. §§ 927.83 and 927.84 of Order No. 27 contravene the Act and are an unlawful restriction on market entry.

2. Whether under § 8c(5) of the Act dairy farmers engaged in the production of milk for sale in a regulated marketing area may be denied the status of a "producer" and excluded from the benefits of the Act.

3. Whether § 8c of the Act grants the Secretary of Agriculture authority to impose a charge on "non-producer" milk prohibiting or limiting the entry into a regulated marketing area of the milk of dairy farmers who produce for sale primarily in other marketing areas.

II. INTEREST OF THE STATE OF MINNESOTA

In 1955 the Minnesota legislature directed its Attorney General to "take such action as he deems necessary in order to contest or oppose existing statutes, ordinances, regulations, orders or other trade barriers which may restrict the sale in other states of milk or other dairy products produced in Minnesota."[1] The action was taken because of the importance of the dairy industry to the agricultural economy of the state.

Minnesota ranks second on a par with New York among the states in total milk production.[2] The annual farm cash

[1] M.S.A. §8.13 (Supp. 1958).

[2] *Milk Production, Disposition and Income*, United States Department of Agriculture, Statistical Reporting Service, April, 1961.

receipts from marketing of all milk and cream amounted in 1960 to approximately $300,000,000.[3] Of this total production, a maximum of 25 per cent can be consumed within the state as milk, cream, butter, and other dairy products.[4] The remaining 75 per cent must be marketed in the channels of interstate or foreign trade.

In 1960 dairy farmers in the United States received an average price of $4.17 cwt. for all milk and cream marketed.[5] The Minnesota average was $3.07 cwt. for milk marketed in all forms. While ranking second in terms of total production, Minnesota ranks fifth in terms of gross income from dairying. The disparity may be emphasized by the fact that Florida produces only one-ninth as much milk as Minnesota but receives for that milk almost one-third of Minnesota's total income from dairying.

There are over 35 major markets in the United States where the price of milk for bottling purposes exceeds the price paid by dealers in Minnesota by more than the cost of transportation to those markets.[6] Such markets are not responsive to price competition because of intermarket barriers which take the form of restrictive sanitary regulations, state milk control laws and certain provisions of federal market orders such as those challenged here.[7]

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[3]Id.

[4]*Report of Governor's Study Commission on Agriculture*, Minnesota, (1958) p. 173.

[5]*Milk Production, Disposition and Income*, *supra* note 2.

[6]*Fluid Milk and Cream Report*, United States Department of Agriculture, March, 1961.

[7]See, e.g., *Hood & Sons v. DuMond*, 336 U.S. 525; *Dean Milk Co. v. City of Madison*, 340 U.S. 349; *Regulations Affecting the Movement and Merchandising of Milk*, United States Department of Agriculture, Marketing Research Report No. 98 (1955) p. 50-58; *Classified Pricing of Milk*, United States Department of Agriculture, Technical Bulletin No. 1184 (1958) p. 32:

"• • • Compensatory payments are amounts of money

Barriers to market entry deny Minnesota milk producers a substantial market for fluid milk and compel the diversion of such milk into lower-valued manufacturing uses. Such barriers permit those within the protected area to ignore alternative sources of supply and extract a monopoly price from consumers. The excess production thereby induced is diverted into manufactured products and dumped onto the national market, thus depressing the value of milk produced in the midwest primarily for manufacturing purposes.[8]

Federal milk order restrictions such as those challenged

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which regulated handlers are required to pay into the pool for that portion of unregulated milk used in specified classes * * *. * * * * *

"Considerable controversy has centered around these devices as possible barriers to movement of milk to the markets where it would be most effectively utilized.

[8] *Report of Governor's Study Commission on Agriculture*, Willard W. Cochrane, Chairman*, *supra*, p. 185:

"But there are other important considerations with regard to the competitive position of Minnesota milk in Eastern and Southern markets. High Class I prices in some of the federal order and state controlled markets have undoubtedly underwritten an expansion in milk production in those areas. This is indicated by the fact that in many of these 'protected' markets an increasing proportion of milk is being utilized for manufactured dairy products; and certainly these markets have not experienced any contraction in their fluid milk requirements. For example, in 1947-48 about 39 percent of the milk received in the New York federal order market went into manufactured dairy products; in 1955-56 this had increased to about 53 percent. Similarly, the proportion of milk used for manufacture in the Boston market rose from 35 to 45 percent of the total supply; in the Philadelphia market it rose from 18 to 25 percent; and in the New Orleans market from 12 to 31 percent. The lowering of the Class I milk prices in these order markets would undoubtedly minimize this trend and permit Minnesota and Midwestern producers a larger share of the expanding future markets."

*Formerly Professor of Agricultural Economics at the University of Minnesota, Dr. Cochrane is now Economic Advisor to the Secretary of Agriculture.

here are cumulative in their effect on Minnesota's dairy industry. Similar restrictive provisions, if applied to the approximately 100 federal market orders affecting over two-thirds of the total volume of milk consumed in urban areas in this country, impede inter-area commerce and discriminate against major producing areas of the United States.[9]

III. STATEMENT OF THE CASE

A. Summary of Proceedings Below

This case arises under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 608c. Section 8c(15) (B) of that Act authorizes judicial review of the rulings of the Judicial Officer of the United States Department of Agriculture, who acts pursuant to authority delegated to him by the Secretary of Agriculture.[10]

[9]See, e.g., recent hearings on proposed federal order for Washington, D.C., Marketing Area wherein the Secretary, in recommending the establishment of a regulated market, stated at 23 Fed. Reg. 3721: "Because of the distances that eastern fluid markets are from areas of alternative supply in the Midwest, the price for milk for fluid uses in eastern markets is higher in relation to manufacturing milk values than is the case in the Midwest. Under such circumstances there might be an incentive for dealers in unregulated adjacent markets to seek a Class I outlet in the Washington market for temporary or seasonal surpluses in excess of their local market needs. Because of the substantial number of Government installations in the area which procure their milk supplies on a competitive bid basis for relatively short periods there is a considerable opportunity, unless appropriate safeguards are provided, for such unregulated dealers to market milk excess to their local needs at prices below the value of milk for fluid uses. They may do this by bidding off available contracts at such Government installations. This situation would be a serious disruptive factor to orderly marketing in the Washington marketing area. *It is essential, therefore, that the order be constructed in a manner which will safeguard the market from serving as a surplus disposal area for surrounding markets.*" (Emphasis added.)

[10]The Judicial Officer acts for the Secretary of Agriculture pursuant to delegated authority. 54 Stat. 81, 5 U.S.C. 516 et seq.

Petitioners instituted review proceedings before the Judicial Officer of the Secretary of Agriculture to challenge the validity of §§ 927.83 and 927.84 of Order No. 27 which require "handlers" to make "compensatory payments" on "nonproducer milk" distributed in the marketing area encompassed by the Order. (R. 9a, 26a). In accordance with the procedures of the Secretary, a hearing was held before a hearing examiner with respect to the issues raised by the petition and answer of the Department of Agriculture. (R. 42a.) On the authority of *Kass v. Brannan*, 196 F. 2d 791 (2nd Cir. 1952) certiorari denied 344 U.S. 891, the hearing examiner filed his report invalidating the challenged provisions with respect to both petitioners. (R. 56a, 59a.) Exceptions to the examiner's report were filed by the Secretary of Agriculture (R. 60a, 79a) and, following argument before the Secretary's Judicial Officer, the decision of the hearing examiner was reversed and the questioned provisions were ruled lawful. (R. 86a, 116a; R. 117a, 141a.)

Petitioners sought judicial review in the United States District Court for the Eastern District of Pennsylvania pursuant to § 8c(15) of the Act, and the separate proceedings were consolidated for trial. (R. 198a, 201a.) The district court, following *Kass v. Brannan*, reversed the Judicial Officer and invalidated the challenged provisions of Order No. 27, holding that they did not comply with § 8c(5) (A) and were unauthorized by the Act.[11] That

[11] *United States vs. Lehigh Valley Cooperative Farmers, Inc., et al*, 183 F. Supp. 80, 85: "Essentially [the challenged provisions] required nonpool plant handlers to make a *compensatory payment* to the Producer Settlement Fund for all of the fluid milk they distribute in the Order No. 27 area. These payments help to increase the uniform unit price paid to the regulated suppliers of Order No. 27—and they in no way benefit the farmers who in fact supplied the

section requires that the prices paid by handlers to producers for each class of milk "shall be uniform as to all handlers."

On appeal by the Secretary of Agriculture, the United States Court of Appeals for the Third Circuit reversed the decision of the district court, and rejected the *Kass* holding and reasoning.[12] The court below determined that "Section 8c(5) (A) has no application to non-pool hand-

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milk to these nonregulated handlers. The payments are designed to offset the otherwise harmful effect created by such sales. The compensatory payment in the case of fluid milk sales is based on the difference between the Class I (fluid milk) class price and the Class III (milk products) class price of Order No. 27. For every unit of liquid milk sold by plaintiffs or other partially regulated handlers, this difference must be paid into the fund." The court found: "The government cannot argue (nor has it attempted to argue) that the total cost to the plaintiffs of the liquid milk which they sell in northern New Jersey is equal to the cost to its competitors. There is uncontroverted evidence to prove that the cost of raw milk to the plaintiffs is substantially higher than the Order No. 27 uniform Class III price classification, so that the *total* cost to the plaintiff handlers (when we include the compensatory payment based upon the difference between the uniform Class I and Class III price) will be in excess of the cost to fully regulated pool plant handlers. This is exactly what Judge Swan said §608c(5)(A) of the Agricultural Marketing Agreement Act prohibited. *Kass v. Brannan, supra.*

[12]287 F. 2d 726, 729-730: "The Kass opinion assumes that the minimum class price provision of Section 8c(5)(A) is designed to equalize the actual costs of milk to all handlers distributing milk in the marketing area. • • • This interpretation misconceives the plain language of the section and suggests a policy not contemplated by Congress.

> "Section 8c(5) (A) of the Act makes no reference to equalizing either fully regulated or partially regulated handlers' costs. It provides solely for uniform minimum class prices for which the pool handlers must account to the Producers Settlement Fund. • • •
>
> "Moreover to *imply* the thought urged by Lehigh and Suncrest as the motivation behind Section 8c(5) (A) and thereby measure the compensatory payment by using the Kass formula of equalized actual costs, would be repugnant to the *express* purpose set forth in the Act itself, i.e., regional regulation to secure a stable market and parity prices for producers. • • • "

lers"[13] and that the Act does not include "non-pool producers within the ambit of the term 'producers in Section 8c(5) (A) * * * "[14] It held that the challenged provisions of Order No. 27 were not inconsistent with § 8c(5) (A) of the Act and were authorized by § 8c(7) (D) as "incidental to * * * and necessary to effectuate the other provisions" of the Order.

B. Structure and Operation of Federal Milk Order

1. *The Act*

The Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U.S.C. 601 et seq.)[15] authorizes the Secretary of Agriculture to regulate the marketing of certain agricultural commodities, including milk. The declared policy of the Act is to establish and maintain such orderly marketing conditions for milk — and other agricultural commodities — as will establish parity prices for farmers. 7 U.S.C. § 602. In the event, however, that the prices[16] thus determined are not reasonable in view "of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the * * * order * * * relates," the Act directs the Secretary to fix such price as will "insure a sufficient quantity of pure and wholesome milk, and be in the public interest." 7 U.S.C. § 608c(18).

Section 8c of the Act prescribes the procedures, terms,

[13] 287 F. 2d at 731.

[14] 287 F. 2d at 731, footnote 6.

[15] The provisions of the Act appear as §§ 601-602, 608a(5)-608d, 610(a)-610(c), 610(f)-610(j), 612, 614, 671-674 of Title 7 of the United States Code.

[16] Sec. 2 of the Act (7 U.S.C. § 602) provides that "parity prices" are those defined by § 1301(a)(1) of Title 7 of the United States Code.

conditions and limitations relating to the issuance of a milk marketing order. Orders issued by the Secretary regulate persons "engaged in the handling" of milk, not its production, and are applicable to the particular marketing area defined in the order. § 8c (11) (A). "Such persons are referred to * * as 'handlers'." §§ 8c(1), 8c(13) (B).

A milk order is issued by the Secretary on the basis of findings made upon evidence introduced at a rule making proceeding. §§ 8c (3) (4). It may contain one or more of the terms specified in § 8c(5) and "no others," except certain terms common to all orders set out in § 8c(7). Section 8c(5) authorizes the Secretary to: (1) classify milk in accordance with the form in which or the purpose for which it is used; (2) fix minimum prices for each such use classification which all handlers must pay for milk purchased from producers or associations of producers; (3) provide for the payment to all producers delivering milk to the same handler of a "uniform" or average price for all milk delivered by them[17] (§ 8c(5) (B) (i), or a payment to all producers delivering milk to all handlers in the marketing area of a weighted average or "uniform" price for all milk so delivered, irrespective of the use made of such milk by the individual handler to whom it is delivered.[18] (§ 8c(5) (B) (ii).

In order to accomplish these purposes, the order may provide "a method of making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by

[17]Referred to as an "individual handler pool."
[18]Referred to as a "market-wide pool."

him at the prices fixed in accordance" with the pricing provisions of the Act. § 8c(5) (C).

Auxiliary terms [i]ncidental to, * * * not inconsistent with the terms and conditions specified" in § 8c(5) "and necessary to effectuate the other provisions of [the order]" are authorized by § 8c(7) (D).

After the Secretary has determined that the adoption of an order with respect to a marketing area will effectuate the declared policy of the Act, it must be approved in a referendum by two-thirds of the producers who, during a representative period determined by the Secretary, have been engaged in the production of milk for sale in the marketing area specified in the order. § 8c(9) (B).[19]

Section 8c(7) (C) authorizes the Secretary to designate an agency to administer an order; to make rules and regulations to effectuate its terms; to receive, investigate and report complaints of violations; and to recommend to the Secretary amendments to the order. The cost of administration is defrayed by assessments collected from handlers regulated by the order. § 10(b) (2) (ii).

Section 8c(15) (A) permits a handler subject to an order to challenge the lawfulness of any of its provisions by filing a written petition with the Secretary of Agriculture asserting the grounds of invalidity. The handler must be accorded a hearing before the Secretary's judicial officer whose rulings are "final, if in accordance with law." *Ibid.* Judicial review of his decisions in the district courts of the United States is authorized by § 8c(15) (B) of the Act.

[19]See "Procedure for the Conduct of Referenda," 15 F.R. 5177. With respect to milk, marketing orders do not specify "production areas"; hence the alternative provisions in §§ 8c(9) (B) (i) and (ii) are inapplicable.

2. *Market Wide Pool—Purpose, Operation and Effect.*

(a) Rationale of Market Wide Pooling.

The milk marketing order provisions of the Act involve a commitment to the classified pricing system worked out over the years by the milk cooperatives. Pricing according to use was developed as a means of smoothing out the violent price fluctuations occasioned by the presence of milk supplies surplus to the fluid needs of the market.

The milk supply for a metropolitan area was often limited to those farms within the zone of inspection of the health authority having jurisdiction in the marketing area.[20] Milk production per cow in the spring months of the year may reach a level two to two-and-one-half times the production during the fall and winter. The demand, however, is relatively constant. In order to assure an adequate supply during peak periods of consumption and low production there will necessarily be a surplus during the spring and early summer.[21]

In addition, day-to-day requirements for fluid purposes cannot be precisely measured making it necessary to have

[20]The power of states or local municipalities to exclude milk inspected by other jurisdictions was accepted as a permissible exercise of police power at the time of the adoption of the Act. Hence, little or no attempt was made to supply market requirements during periods of low production from distant production areas. Instead, production from local or nearby sources was geared to supply the market needs during peak periods of highest consumption and lowest seasonal production. In *Dean Milk Co. v. City of Madison*, 340 U.S. 349, the Court held that a city may not regulate its milk supply in such a manner as to discriminate against milk produced in another jurisdiction where non-discriminatory alternatives are available to assure itself of the safety of that supply.

[21]See *Nebbia v. New York*, 291 U.S. 502; *United States v. Rock Coop., Inc.*, 307 U.S. 533, 549.

available to the market an "operating surplus." This necessary "seasonal" and "operating" surplus, competing for the higher-valued fluid milk outlets resulted, oftentimes, in the complete demoralization of the price structure.

To avoid this destructive competition arising from the presence of necessary surplus, the cooperatives, had devised a system of classified pricing which they incorporated into contracts with dealers by the terms of which the dealers agreed to accept all supplies offered by the producer at predetermined prices depending upon the purpose for which the milk was used. *Nebbia v. New York, supra.* However, since the arrangements were voluntary, they often broken down when supplies became burdensome. State milk control laws[22] and the Agricultural Marketing Agreement Act of 1937 supplied government compulsion to what had previously been voluntary price arrangements.

(b) Operation of a Market Wide Pool Under a Federal Order.

Under a milk order handlers (or dealers) pay for milk according to the use for which the handler disposes of it; i.e., according to "use classification." Milk sold for fluid use (Class I milk) has the highest value; the surplus that cannot be sold in fluid form must be processed into manufactured products (Class III in Order No. 27) and has the lowest use value. The price for each class is fixed by the order. The producers supplying the handler, however, are paid neither the Class I nor the Class III price but rather a "blend" or "uniform" price based upon market-wide pooling of all handlers' receipts and sales in accordance with the provisions of § 8c(5) (B) (ii). The "blend"

[22]See, e.g., New York Laws, 1937, c. 383.

price is a weighted average price derived by multiplying the total amount of milk disposed of in the market area by all handlers in all classes by the established price for each class. The product of that multiplication, divided by the total quantity of milk sold in the market, yields the "blend" or "uniform" price paid to producers located at fixed distances from the market center. Location differentials above or below the "minimum blend price" allow for the cost of transportation to the market. § 8c(5) (A) (ii) (c). "The purpose of the [location] differentials is to make it possible for handlers to procure milk throughout the supply area at a delivered cost that is uniform with that of other handlers."[23]

Since § 8c(5) (A) of the Act requires uniformity of class price among handlers, some handlers will pay into or receive from a "Producer Settlement Fund" the amount by which their purchased milk, multiplied by the minimum prices for each class, is greater or less than their purchased milk multiplied by the uniform price.

3. Order No. 27.

Order No. 27 was adopted in 1938 shortly after the passage of the Act and regulated the marketing of milk in the New York city metropolitan area. The Act and the Order were considered by this Court and sustained in *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, and have been the subject of other litigation since that time.[24] Order No. 27 originally defined the marketing

[23] *Regulations Affecting the Movement and Merchandising of Milk, supra*, p. 61. The price received by producers varies inversely with their distance from the market center, subject to certain limitations.

[24] *United States v. Adler's Creamery, Inc.*, 110 F. 2d 482 (2d Cir. 1940); *New York State Guernsey Breeders' Coop., Inc., v. Wickard*, 141 F. 2d 805 (2d Cir. 1944); *Grandview Dairy, Inc., v. Jones*, 157

area as "the City of New York and the Counties of Nassau, Suffolk and Westchester." *United States v. Rock Royal Coop., Inc., supra* at 554. As originally adopted, a "producer" under the Order was "any person producing milk delivered to a handler at a plant approved by a health authority for the receiving of milk for sale in the marketing area", *ibid.*, while a "handler" was "a person engaged in the handling of milk or cream received at an approved plant for similar sale." *Ibid.*

Handlers were regulated with respect to milk entering the marketing area. The Order required them to pay the "uniform pool" or "blended" price calculated by the marketing administrator to all producers delivering milk during any month unless the handler had sold it as Class I milk outside of the marketing area.[25] "In such instance, the handler [was] required to pay the uniform price to each producer on that part of the milk received which [was] equal to the proportion of milk to which minimum prices [were] applicable. For the remainder of each producer's milk, the handler [paid] such prices as he [saw] fit but [was] required to furnish the producer with a statement of the percentage of the producer's milk paid for at the uniform price."[26]

Under Order No. 27 as originally adopted, handlers were permitted to blend prices paid for milk sold in other

F. 2d 5 (2d Cir. 1946); *Dairymen's League Coop. Ass'n v. Brannan*, 173 F. 2d 57 (2d Cir. 1949); *Titusville Dairy Products Co. v. Brannan*, 176 F. 2d 332 (3d Cir. 1949); *Kass v. Brannan*, 196 F. 2d 791 (2d Cir. 1952); *Grant et al v. Benson et al*, 229 F. 2d 765 (App. D.C. 1955).

[25]See *United States v. Rock Royal Coop., Inc., supra* at 565: "The Order • • • limits minimum prices to milk 'sold in the marketing area or which passes through a plant in the marketing area.' Other milk, though from the same production area, is 'unpriced milk' and does not figure in the computation of the uniform price."

[26]*United States v. Rock Royal Coop, Inc.*, Record, p. 96.

markets, with the uniform price announced by the administrator for milk sold in the regulated marketing area. 307 U.S. at 566. Since the purpose of the Act and the Order is "to establish and maintain * * * orderly marketing conditions"[27] and to insure a sufficient quantity of pure and wholesome milk "*in the marketing area to which the contemplated * * * order * * * relates,*"[28] (emphasis supplied) the administrator was not concerned with that portion of a regulated handler's total milk receipts sold outside of the regulated marketing area.[29]

In 1945 Order No. 27 was amended to create a class of persons termed "dairy farmers who are not producers."[30] The section required payments to be made to "producers" through the "Producer Settlement Fund" by "handlers" who received milk from "dairy farmers who are not producers." The charge, termed a "compensatory payment," was paid to "producers" upon each cwt. of milk received from non-producer dairy farmers and was measured by the difference in price between the Class I, or highest valued use, and the lowest valued use. The charge upon milk of "farmers who are not producers" was voted into effect by a referendum under §§ 8c(9) and (19) of the Act, which

[27] 7 U.S.C. § 602(1) (4).

[28] 7 U.S.C. § 608c(18).

[29] *United States v. Rock Royal Coop., Inc., supra* at 566-7: "It is erroneous to suppose that by buying some milk at less than the minimum, the 'actual price' paid for milk sold in the marketing area is reduced. The price paid for all milk sold by proprietary handlers in that area is the uniform price. Unpriced milk from the same producer may be bought for less. The average paid the producer may be below the minimum but for the part sold in the marketing area or passing through plants there located the minimum is paid."

[30] Sec. 927.8(e) of Order Regulating the Handling of Milk in the New York Metropolitan Milk Marketing Area, adopted August 1, 1945.

referendum was limited only to "producers" in accordance with the voting regulations of the Secretary.[31] Accordingly, voting was limited to "producers" who were the intended beneficiaries of the proposed amendment. Dairy farmers who could not qualify as producers though engaged in the production of milk for sale in the marketing area were excluded from voting.[32]

The "compensatory payment" provisions of Order No. 27 were challenged in *Kass v. Brannan*, 197 F. 2d 791 (2d Cir. 1952). The plaintiff in that case, a "pool handler" regulated under Order No. 27, had bought non-pool cream and condensed milk from an Ohio plant for sale to ice cream manufacturers in the marketing area. He was assessed payments by the administrator amounting appproximately to 21 cents per quart of cream and 80 cents per cwt. of milk for all such non-pool cream and condensed milk purchased during the period involved in that case. In an administrative proceeding under § 8c(15) (A) of the Act challenging the compensatory payment provisions, the hearing examiner held that the charges were invalid because violative of § 8c(5) (G) of the Act.[33] The Sec-

[31]See "Procedure for the Conduct of Referenda," 15 F.R. 5177: "Each producer, *as defined in the Order or amendment with respect to which the referendum is to be conducted*, who, during the representative period determined by the Secretary, was engaged in the production of milk for sale in the marketing area, shall be entitled to one vote in any such referendum • • • " (Emphasis added)

[32]Sec. 927.8(e) and (f) of Order No. 27 as amended in 1945 limited the term "producers" to dairy farmers who delivered milk to a "pool plant." A plant could become a "pool plant" only if it was located in one of the six states of the so-called New York Milk Shed — i.e., New York, Massachusetts, Connecticut, Pennsylvania, New Jersey, Vermont, § 927.3(a) (2) (i), and if it shipped fluid (Class I-A) milk into the New York marketing area under prescribed conditions.

[33]"No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner

retary's Judicial Officer refused to adopt the findings, report and decision of the hearing examiner and ruled that the compensatory payments provision of Order No. 27 was authorized by the "incidental" power of the Secretary under § 8c(7) (D) of the Act. While the Secretary in his findings accompanying the adoption of § 927.8(e) found that the levy was necessary to prevent "inequality in the cost of milk" as between handlers buying milk "from other than producer sources" and those buying from "producers," "with accompanying loss of market for producers' milk" the Judicial Officer held the provision lawful on the grounds that, unless payments were imposed on "outside cream," it would be able to displace cream from pooled milk (8 Ag. Dec. 1083), and that the payment is a "compensatory" one, for "the benefit of the pool milk producers" to compensate the latter when their milk is displaced by the milk of "dairy farmers who are not producers." (8 Ag. Dec. 1083).

The district court adopted the ruling of the judicial officer. However, on appeal, the Courts of Appeals for the 2d Circuit termed the challenged provisions "penalty payments" and held that the sections of Order No. 27 authorizing them violated § 8c(5) (A) of the Act.

After the decision in the *Kass* case, new hearings were held on Order No. 27 and a new compensatory payment provision was adopted on the basis of evidence submitted at that hearing.[34] Essentially the same compensatory pay-

limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

[34]The Secretary interpreted *Kass* as holding that the compensatory payments there involved were not justified by the evidence.

ment provisions invalidated by *Kass* were incorporated in amended Order No. 27 based on findings by the Secretary that the value of non-pool milk to a regulated handler is the Class IV or surplus price and that elimination of the provision would give an unfair advantage to non-pool handlers in competition for producer supplies. (R. 756a.)

On May 25, 1956, a Notice of Hearing was published in the Federal Register (21 F.R. 3537-3539, R. 44a) to consider the establishment of a separate milk order for New Jersey or the extension of Order No. 27 to include a portion of northern New Jersey. After extensive hearings (R. 46a-47a), findings based upon the evidence received at these promulgation hearings were made tending to show that northern New Jersey is a part of the New York metropolitan milk marketing area (R. 47a) and that unregulated handlers (including these petitioners) market milk in that area in competition with handlers regulated under Order No. 27 It was also found by the Secretary that milk may be bought for fluid use by unregulated handlers for sale in northern New Jersey at slightly above the Order No. 27 uniform price. (R. 49a.)

In a recommended decision and order based upon the foregoing proceedings (22 F.R. 3318-3357, R. 49a), the Secretary proposed that the handling of milk in northern New Jersey should be brought under regulation by amending Order No. 27 to include that area. (R. 49a.) The recommended order also included provisions (§§ 927.83, 927.84) for compensatory payments into the Producer Settlement Fund under certain conditions, amounting to the difference between the Class I-A, or fluid milk price, and Class III, or surplus price, to be paid by outside handlers who dispose of "non-pool" or "non-producer" milk within the marketing area. (R. 49a.)

A final decision and order, in substantially the same form as the recommended order, was published in the Federal Register for July 2, 1957, to become effective on August 1, 1957, (22 F.R. 4643-4659, R. 50a) extending Order No. 27 to northern New Jersey. As a result of that order, petitioners who theretofore were unregulated by Order No. 27 were brought under its regulatory provisions with respect to milk distributed in that part of New Jersey included in the Order No. 27 marketing area. By virtue of §§ 927.83 and 927.84 and complementary provisions, petitioners were ordered to make payments into the Producer Settlement Fund on all milk distributed in that area.

The provisions of Order No. 27 relevant to the issues in this case are as follows:

7 C.F.R. § 927.5 — Dairy Farmer. "Dairy farmer" means any person who produces milk.

§ 927.6 — Producer. "Producer" means any dairy farmer whose milk is delivered direct from farm to a pool plant.

§ 927.7 — Handler. "Handler" means (a) any person who engages in the handling of milk or products therefrom, which milk was received at a pool plant, or at a plant approved by any health authority as a source of milk for the marketing area, (b) any person who engages in the handling of milk, concentrated fluid milk, cultured or flavored milk drinks, cream, half and half, or skim milk, all or a portion of which is shipped to, or received in, the marketing area, or (c) any cooperative association of dairy farmers with respect to any milk which it causes to be delivered from dairy farmers to a pool plant of any other handler for the account of such association and for which such association receives payment.

§ 927.75 — Producer settlement fund. The market administrator shall establish and maintain a separate fund known as "the producer settlement fund" into which he shall deposit all payments and out of which he shall make all payments pursuant to §§ 927.77 through 927.84.

§ 927.83 — Payments on milk received from dairy farmers at nonpool plants. Payments shall be made by handlers to producers, through the producer settlement fund, for milk and milk products under conditions, in amounts, and by the handler pursuant to paragraphs (a) through (d) of this section: *Provided*, That for any month in which the volume of Class III milk used in the computation of the uniform price is less than 15 percent of the combined volume of the Class I-A and Class II milk used in such computation, the payments set forth in this section shall not be required.

(a) Payments shall be made for milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, cream, half and half, fluid cream products, and skim milk, which milk or milk products meets each of the following conditions:

(1) It was derived from milk received at a nonpool plant from dairy farmers or is received at a plant from which milk specified in § 927.65(h) (2) or (3) was received from the handler's own farm.

(2) It was shipped to, received in, or distributed in the marketing area, or was received at a pool plant outside the marketing area.

(3) The milk or milk equivalent of the butterfat is classified as Class I-A or Class II, or the skim milk would be subject to the fluid skim differential if it were derived from pool milk.

(b) The amounts of payment for the products set forth in paragraph (a) of this section shall be as follows:

(1) If the milk or the milk equivalent of the butterfat, or the skim milk is classified and paid for under another order issued pursuant to the act, the amount of payment on such products, except skim milk, shall be any plus amount obtained by subtracting the value of the milk or the milk equivalent of the butterfat at the class price or prices under such order from the value computed in accordance with the classification and pricing set forth in this part: *Provided*, That the payment shall be at the rates set forth in subparagraph (2) of this paragraph if the other order permits the deduction of such payment from the amount otherwise due for such milk pursuant to such other order. The amount of payments on skim milk shall be an amount computed pursuant to § 927.44 adjusted for the location of the plant.

(2) If the milk or milk product is derived from milk received from dairy farmers at a nonpool plant in the 401-425 mile zone, or in some other zone nearer the marketing area, the handling of which is not regulated by an order issued pursuant to the act or is regulated by another order as specified in the proviso of subparagraph (1) of this paragraph, the amount of payment, except as otherwise specified in subparagraph (4) of this paragraph, shall be the differences between its classified value at the Class I-A or the Class II price, depending upon its classification, and its value at the Class III price, such class prices to be adjusted for butterfat test and the location of the plant at which the non-pool milk was originally received from farmers: *Provided*, That for concentrated fluid milk, cream, half and half, fluid cream products, and

cultured or flavored milk drinks containing less than 3.0 percent or more than 5.0 percent butterfat, the payment shall be computed on the milk equivalent thereof as so classified. The amount of the payment on skim milk (either as skim milk, half and half, or in cultured milk drinks) shall be the amount computed pursuant to § 927.44 as similarly adjusted for location. * * *

(c) Payment for any milk or milk product pursuant to this section shall be made, on behalf of the handler receiving the milk from dairy farmers, by the appropriate handler as set forth in subparagraphs (1) through (3) of this paragraph: *Provided*, That if the milk is received from a handler under another order issued pursuant to the act, which order provides that the payment to the producer settlement fund may be deducted from the handler's obligation under the other order, the payment shall be made by the handler subject to the other order regardless of the provisions of subparagraphs (1) through (3) of this paragraph: * * *

(d) The amount due pursuant to this section shall be entered on the handler's account as a debit immediately after the filing of the report pursuant to § 927.50, or if the handler fails to file such report, such amount shall be entered on the handler's account in accordance with § 927.80.

Petitioner Lehigh Valley Cooperative Farmers, Inc., is a farmers cooperative composed of milk producers, some of whom ship milk to the Lehigh Valley plant in Allentown, Pennsylvania. (R. 88a.) From this plant the cooperative distributes milk in the surrounding area in Pennsylvania and in a portion of New Jersey included within Order No. 27. This New Jersey market has been

served by the petitioner for approximately twenty years, its sales therein representing about 8 per cent of its total bottled milk business. (R. 303a) Petitioner Lehigh Valley is also a regulated handler under Order No. 61, a federal order regulating the marketing of milk in the Philadelphia, Pennsylvania, milk marketing area. By virtue of that order and the regulatory provisions of the Pennsylvania Milk Control Commission, prices paid by Lehigh Valley to its producers were fully regulated prior to the extension of Order No. 27 to the New Jersey area. (R. 88a.)

Petitioner Suncrest Farms, Inc., is a proprietary corporation located in Bethlehem, Pennsylvania. It receives milk from farmers and processes, bottles and distributes it in the surrounding area of Pennsylvania and in a part of New Jersey regulated by the extension of Order No. 27. Approximately 4 per cent of its total bottled milk sales are in the New Jersey area.

Petitioners are "handlers" (§ 927.7) distributing in a part of the Order No. 27 marketing area the "non-pool milk" (§§ 927.25, 927.29) of dairy farmers who are not "producers." (§§927.5, 927.6.) By virtue of §§ 927.83 and 927.84, petitioners were billed compensatory payments by the administrator to be paid into the Producer Settlement Fund for distribution to Order No. 27 producers upon all "non-pool milk" distributed by them in the areas subject to regulation under Order No. 27.

SUMMARY OF ARGUMENT

The purpose and policy of the Agricultural Marketing Agreement Act of 1937 is to alleviate chaotic marketing conditions by promoting and encouraging interstate commerce in the products regulated by the Act. The Act authorizes the Secretary to fix prices to be paid by handlers

to producers with respect to milk sold in a regulated area. Section 8c(5)(G), by its terms, legislative history and judicial construction, is intended to prohibit the Secretary from placing barriers in the way of the interstate flow of milk and milk products. Section 8c(5)(D) is the sole authority for restricting access of new producers to the market.

The Act narrowly circumscribes the terms and conditions that may be included in a milk order. Nowhere does the Act permit the Secretary to exclude qualified dairy farmers from the benefits of the Act. The Secretary's definition of the term "producer" is designed solely to divide and allocate markets among dairy farmers rather than to protect the price structure in the market. The purpose and effect of the challenged provisions is to insulate the regulated marketing area against the competition of milk and dairy products produced in other production areas of the United States. The provisions are designed avowedly to give market preference to regional producers and to discriminate against other production areas.

The challenged provisions burden and obstruct the channels of interstate trade and conflict with basic antitrust policy. The Act grants antitrust immunity only to price fixing arrangements adopted in accordance with its terms and conditions. The Secretary, through the exercise of an authority to adopt terms and conditions "incidental" to the main purposes of the act, had unlawfully assumed the power to foreclose competitors from substantial markets.

ARGUMENT

I

THE COMPENSATORY PAYMENT PROVISIONS OF ORDER NO. 27 UNLAWFULLY DISCRIMINATE AGAINST QUALIFIED PRODUCERS BY EXCLUDING THEM FROM THE MARKETING AREA

The question in this case is whether certain provisions of the New York-New Jersey milk marketing order, 7 C.F.R. § 927.1 et seq. are within the statutory authority granted to the Secretary of Agriculture by the Act. The case raises a question of the statutory power of the Secretary of Agriculture to separate dairy farmers serving a market into "producers" and "dairy farmers who are not producers," limiting or restricting the latter from entry into the market regulated by the Order.

Warrant for the Secretary's orders must be found in the Act. Economic necessity is no substitute for lack of statutory authority. As in *Denver Union Stock Yard Co. v. Producers Livestock Marketing Association*, 356 U.S. 282, 289, here, too, "it is argued that the present regulation is needed" to maintain the integrity of the marketing plan. But as this Court said in that case: "If the Act does not fit the present economics of the business, a problem is presented for the Congress."

The court below found the challenged provisions authorized as "incidental to * * * and necessary to effectuate the other provisions * * *" of the Order under § 8c (7) (D) of the Act. 287 F. 2d at p. 732. It is on that source of power alone that the Secretary relies here. (See Mem. For Resp., pp. 17, 23-24.)

A. The Act Does Not Authorize Market Preference For Regional Producers.

The court below stated that the "*express* purpose" of the Act is "regional regulation to secure a stable market and parity prices for producers." 287 F. 2d at 730. In holding that the Act empowers the Secretary to compel "outside" producers entering a market to compensate the market's "primary producers" for loss of sales,[35] the court accepts market exclusion as a permissible device to accomplish the Act's objectives.

The holding is grounded on the erroneous premise that the § 8c (11) (C)[36] requirement that the Secretary consider regional differences in framing marketing orders a norizes preferred treatment for regional producers and market exclusion of "non-producer" dairy farmers from the regulated marketing area. Having assumed that the "ultimate goal of the Act" is to stabilize a market for regional producers (287 F. 2d at p. 732), the court moved easily to the conclusion that the "establishment of the Act on a regional marketing basis necessitates differentiation between pool and non-pool handlers" (287 F. 2d at p. 731) and exclusion of non-pool producers from "within the ambit of the term 'producers' in Section 8c (5) (A) • • • ". 287 F. 2d at p. 731, fn. 6. The Act's objectives of orderly and stable marketing conditions are to be achieved, according to the court below, by restrictions on

[35]See (R. 754a.)

[36]7 U.S.C. §608c(11)(C) provides: "All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas."

market entry rather than by compelling adherence by all handlers to the market's uniform price structure.

1. *The Act Does Not Authorize a Division of Dairy Farmers into "Producers" and "Non-Producers," Excluding the Latter From Its Benefits.*

Section 927.5 of Order No. 27 defines a "dairy farmer" as "any person who produces milk." Section 927.6 defines a "producer" as "any dairy farmer whose milk is delivered direct from farm to a pool plant." A "pool plant" is any plant so designated prior to the July 1, 1957, amendments extending Order No. 27 to the New Jersey area (§ 927.25) or any plant located in New York, New Jersey or Pennsylvania (§ 927.25 (b)) having health department approval for the distribution of milk in the marketing area and disposing of the major share of its receipts from dairy farmers in fluid form in the marketing area (§§ 927.25 (d), 927.27 (g), 927.29).[37] Only a "producer" may freely market his milk in the area regulated by Order No. 27. A "dairy farmer" delivering milk to a plant having some sales in the Order area but which is not located in New York, New Jersey or Pennsylvania (§ 927.25 (b)) or which, though located in those states, has its major distribution of milk in other markets (§ 927.29) is excluded thereby from the pricing and pooling provisions of the

[37] "Prior to the August 1, 1957 amendment to Order No. 27, those handlers who sold less than one-half of their total milk sales in the Order No. 27 area could not have their plants recognized as pool plants * * *." Opinion, district court (R. 214a-215a). Subsequent to the commencement of review proceeding in the district court, Order No. 27 was amended "so as to make handlers, such as plaintiffs, who sold milk in the Order No. 27 area fully regulated handlers unless they *elected* to be nonfully regulated handlers subject to the compensatory payment provisions of the Order * * *." (R. 228a.)

Order. The "non-pool handler" distributing the milk of a "dairy farmer" in the Order No. 27 area is required by §§ 927.83 and 927.84 of the Order to pay a charge of approximately 5½ cents per quart on all such milk for distribution among the market's "regular" producers "to compensate the pool for the loss of the Class I fluid milk utilization and[to] protect the uniform blend price in the marketing area." 287 F. 2d at p. 730. Non-pool handlers must pay this charge even though they have paid their "dairy farmers" the market order's minimum prices.[38]

Justification for differentiation and exclusion of "dairy farmers" and "non-pool handlers" is claimed to be found in § 8c (11) (A) of the Act. According to the government, that section "expressly directs that marketing orders be limited in application to *regional* production or marketing areas. The authorization of regional orders requires, in turn, that a line be drawn between those producers and handlers subject to the pooling provisions of a particular order and those who are not, and it is that function that is served by the Secretary's definitions of 'producers' and 'pool plants' under Order No. 27." (Mem. For Resp., p. 22.)

But a careful examination of the Act shows, clearly, that nothing in § 8c (11) expressly or impliedly authorizes the Secretary of Agriculture to regulate or limit either the production areas or the producers who may sell their milk in a regulated marketing area. Section 8c (11) (A) provides:

[38] "• • • the uncontroverted facts in this case are that [petitioners] can NOT purchase raw milk from its producers at [the Class III] price • • •. Thus its *actual cost* plus the compensatory payment is substantially higher than the cost to fully regulated Order No. 27 handlers." Opinion, Clary, J., District Court, fn. 9 (R. 224a.)

> "No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of [the Act]."

Section 8c (11) (B) provides that:

> "*Except in the case of milk and its products*, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy." (Emphasis supplied.)

With respect to milk orders, the reference to production areas is inapplicable. Orders regulate the "handling," not the production of milk. § 8c(1). Section 8c (13) (B) states that:

> "No order issued under [the Act] shall be applicable to any producer in his capacity as a producer."

The Secretary is directed by § 8c (11) (A) to establish regional "marketing areas" and by § 8c (11) (C) to "give due recognition to the differences in those marketing areas. Nothing in those sections permits him to circumscribe production areas or limit the meaning of the term "producers" or their entry into the market.

2. *The Order No. 27 Definition of "Producer" Is Contrary to the Act.*

The term "producer" appears throughout the Act but nowhere does the Act speak of "dairy farmers who are not producers." Sec. 8c (5) (A) of the Act authorizes the

fixing of minimum prices by handlers "for milk purchased from producers." Nowhere, however, does the section permit the Secretary to transfer to certain "regular producers" a part of the price paid by handlers to "dairy farmers who are not producers" as condition of entry into the regulated market.

Section 8c(5)(B) authorizes the "payment to all producers * * * of uniform prices for all milk delivered by them"; and § 8c(5)(C) authorizes the accomplishment of such uniformity by "providing a method for making adjustments in payments as among handlers." Sec. 8c(9)(B)(i) of the Act provides that an order may be issued if approved or favored: "by at least two-thirds of the producers * * * who, during a representative period determined by the Secretary, * * * have been engaged in the production of [milk] for sale in the marketing area specified in such marketing * * * order.[39]

It is uncontroverted that the dairy farmers supplying these petitioners have been continuously engaged in the production of milk for sale in the marketing area specified in Order No. 27 for periods of up to twenty years. Nonetheless, they have been "defined" out of the category "producers" and excluded from the market by the Secretary's determination that they are not the market's "regular" or "primary' suppliers. The plain words of § 8c(9)(B)(i) of the Act require the Secretary to include in the term "producer" any person who, during a selected month, prior to the adoption of the Order produced milk approved for sale and, in fact, sold in the regulated area.

A similar attempt to limit by regulation a clear and

[39]See "Procedure for Conduct of Referenda," supra note 19. The alternative provisions of §§ 8c(9)(B) (i) and (ii) are inapplicable.

unambiguous statutory definition was held invalid in *Addison v. Holly Hill Co.*, 322 U.S. 607. That case was an action by employes for wage payments under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* Section 13 (a)(10) of the act exempted from its coverage persons "within the area of production (as defined by the Administrator), engaged in * * * canning of agricultural * * * commodities for market * * *." The Administrator, by regulation, directed that the exemption should include individuals engaged in canning "if the argicultural or horticultural commodities are obtained by the establishment where he is employed from farms in the immediate locality and the number of employes in such establishment does not exceed seven." 322 U.S. at p. 609. This Court noted that Congress had placed a broad discretion in the Administrator to weigh and synthesize all factor relevant to the limitation of an "area of production," but nonethless held the regulation invalid, stating (322 U.S. at p. 614):

> "* * * if Congress intended to allow the Administrator to discriminate between smaller and bigger establishments within the zone of agricultural production, Congress wholly failed to express its purpose. Where Congress wanted to make exemption depend on size, as it did in two or three instances not here relevant, it did so by appropriate language. *Congress referred to quantity when it desired to legislate on the basis of quantity.*" (Emphasis supplied.)

Commenting further on the administrator's action, this Court observed (322 U.S. at p. 617):

> "* * * it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. 'The natural meaning of words cannot be displaced by reference to difficulties in administration.' * * *"

The meaning of the term "producers" under § 8c of the Act was considered in *H. P. Hood & Sons v. United States*, 307 U.S. 588. In that case appellants claimed that the Secretary had unlawfully excluded certain producers from voting in a referendum to determine producer approval of the proposed order. He had limited voting "to producers who had delivered milk to a station approved for the shipment of milk to the marketing area and which had shipped milk or cream to the marketing area during the representative period" (307 U.S. at p. 597). This court noted (307 U.S. at p. 598):

> "The Secretary 'may conduct a referendum among producers.' What producers? Those 'engaged in the production of [milk] for sale in the marketing area * * *.' Every producer who voted was so engaged. Each delivered milk to the plant of a handler licensed to distribute and sell fluid milk in the marketing area. *The Order is aimed at the handling of milk marketed in the area.* * * *" (Emphasis supplied.)[40]
>
> "* * *
>
> "* * * Nor can it make any difference that less than 50 percent of the milk of some stations was shipped to the marketing area during the representative period. There is nothing in the Act that compels adopting 50 percent as determinative. It was enough that the handlers of these producers did send some part, and could have sent all."

[40] The court below and the government here erroneously assume that a dairy farmer who comes "within the ambit of th term 'producer' in § 8c(5)(A)" must necessarily subject *all* of his production to full regulation. (See, 287 F. 2d at 731, fn. 6.) The Act, however, intends the regulation of handlers with respect only to milk disposed of in the regulated area. See, *Hood* case, *supra*, and *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, 558:

> "* * * the uniform price[s] [paid by dealers to producers] are not applicable to milk sold outside the marketing area * * *."

The Secretary, in that case, "* * * considered as producers those persons who, during a representative period (May, 1937), delivered milk to a station, which station, in that month, shipped some part of its products to the marketing area as milk or cream and was approved by one or more of the health authorities in the marketing area."[41]

The court's holding in *Hood* means simply that a dairy farmer is a "producer"—*with respect to the share of his milk that enters the regulated marketing area*—within the meaning of the Act and the order so long as he ships to a handler who distributes milk in the regulated area.

The term "producer" had the same meaning in Order No. 27 as originally adopted in 1938. See *United States v. Rock Royal Coop., Inc.* 307 U.S. 533. There, "producer milk" was all milk approved for sale by the health authority having jurisdiction in the marketing area. "Partial regulation" meant only that all milk sold in the marketing area had to be paid for by the handlers at the "uniform price." A "producer" under the Order was "any person producing milk delivered to a handler at a plant approved by a health authority for the receiving of milk for sale in the marketing area." 307 U.S. at p. 554. The Order required that the minimum price be paid only for milk:

> " 'sold in the marketing area or which passes through a plant in the marketing area.' Other milk, though from the same production area, [was] 'unpriced milk' and [did] not figure in the computation of the uniform price. Where both priced and unpriced milk [was] dealt in by a handler he [furnished] a statement to

[41]See Record, Vol. II, 202, *Brief for Respondent Secretary of Agriculture*, p. 115, *Whiting Milk Company v. United States of America and Henry A. Wallace, Secretary of Agriculture*, No. 809, October term, 1938.

the producer showing the percentage of his milk paid for at the uniform price." (307 U.S. at p. 656)

Nothing in the Act permits the Secretary to divide plants and producers into groups geographically or according to whether they elect to become regularly associated with the market, excluding from the market all who fail to meet the volume requirements imposed. The government's arguments aimed at demonstrating the need for compensatory payments, based upon definitions of "pool" versus "non-pool" plants, "producers" versus "non-producer" milk, and "regulated" versus "non-regulated" or "partially regulated" handlers fail to disclose that *all of these terms are defined by the administrator, not the Act,* on the basis of certain presuppositions that petitioners here assert are without statutory support. The Secretary, having established a market structure on the basis of his own definitions, now insists that the challenged regulations are necessary to its proper functioning.

B. The Compensatory Payment Provisions Unlawfully Limit or Prohibit the Entry of Qualified Producers Into the Market Contrary to §§8c(5)(D) and 8c(5)(G) of the Act.

The Judicial Officer and the court below held that the compensatory payment provisions of Order No. 27 are valid measures appropriately designed to protect "producers" against displacement of Class I sales by unregulated outside milk. The Judicial Officer said: "It is the milk subject to classification, pricing and pooling under Order No. 27, that is, milk received at pool plants, with respect to which the declared policy of the act is operative under the order" (R. 134a.). The district court invalidated

the compensatory payment provisions of Order No. 27 on the authority of *Kass v. Brannan*, 196 F. 2d 791 (2d Cir. 1952) certiorari denied 344 U.S. 891.

In *Kass* the court held that the provisions of Order No. 27, imposing "compensatory payments" on a dealer with respect to "outside milk" distributed in the New York area, were not authorized by the Act. The court found that the "penalty," when added to the handler's actual cost, resulted in a "price discrimination between a handler who purchases non-pool milk products and one who purchases pool milk products, although each makes the same use of such products in the New York marketing area." 196 F. 2d at p. 796. Such lack of uniformity, the court found, contravenes § 8c(5) (A) of the Act. In *Lehigh*, on the other hand, the court below deemed protection of the producers' market on a regional level the essential purpose of the Act.

The two decisions adopt inconsistent and irreconcilable views of the purposes of § 8c of the Act. Adopting the reasoning of the court below, only those producers primarily associated with the regulated market would be permitted to supply it, since the compensatory payment is measured to result in total exclusion. The *Kass* decision, on the other hand, would exclude "outside producers'" milk from the regulated market only to the extent that its entry would give a handler in the market a competitive price advantage and break down the pricing structure established by the Order.

1. *In Adopting the Act, Congress Considered and Rejected Measures That Would Have Limited Market Entry.*

The language of § 8c and its legislative history support the holding of *Kass* and opposes the decision of the court below. Section 8c(5) of the Act expressly limits the provisions of a marketing order to the terms and conditions in §§ 8c(5) and 8c(7) and "no others." Section 8c(5)(G) provides:

> "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

The problem of competition in the sale of milk and milk products from other markets or from "new producers or new producing areas" was before the Congress when it considered the adoption of the Act. Under § 8 (3) of the Agricultural Adjustment Act of 1933,[41] the Secretary was authorized to issue licenses regulating processors and producers engaged inthe handling of any agricultural commodity. Explaining the dairy program under that Act, Dr. Clyde L. King, the first head of the Dairy Branch of the United States Department of Agriculture, said in 1933:

> "A second essential, it seems to me is that in these whole milksheds there must be territorial limitations. If the cities and the states are to place health requirements as to sanitary conditions under which milk is to be produced, it is only fair that there be adequate territorial limitation so that the farmers who have

[41] 48 Stat. 31, repealed by § 5 of this Act.

those added costs may benefit from the possibility of reasonably higher prices to compensate these costs. "* * *

"Not only must be have some territorial limits but it must be clear, as these trade agreements are set up, that all buyers must buy in that territory on the price and under the plan. * * *"[42]

Such an approach to the problem was natural in 1933. Local jurisdiction over milk supplies was accepted as the rule and market patterns were developed accordingly.[43] But debates in Congress on the 1935 amendments reflected the strong opposition to Dr. King's policy that "buyers must buy in that territory on the price and under the plain." Alert to the competitive nature of the milk industry, Congress, in the debates preceding the adoption of the Act, considered carefully measures to protect "regulated" milk against destructive competition. In the House committee which considered the bill, Representative August Andresen, of Minnesota asked:

"Is there anything in the milk section of the bill which gives the Secretary authority to set up trade barriers and stop the free flow in commerce throughout the United States of dairy products?"

He was answered by Representative Jones of Texas:

"No. There is nothing in that bill that would authorize that. The Secretary may require that in crossing from one region to another that they comply with the same conditions which the farmers and distributors comply within that region * * * but he cannot set up any trade barriers which would keep them out. * * *"[44]

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[42]Black, *The Dairy Industry and The A.A.A.* (1935) p. 472.
[43]But see, *Dean Milk Co. v. City of Madison*, 340 U.S. 349.
[44]79th Cong. Rec. 9462 (1935).

Representative Andresen's concern was not allayed, however. He offered the following amendment:

> "(g) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit the marketing in that area of any milk or product thereof produced in any production area of the United States."[45]

Representative Sauthoff of Wisconsin suggested that the words "limit or tend to limit" be substituted for "prohibit," to assure that the regulatory scheme could not be used as a device to exclude Wisconsin milk and cream by indirect means. Representative Jones, of the House Committee on Agriculture objected that this would wreck the whole milk program. He agreed, however to adopt the word "prohibit" because:

> "That simply treats all areas alike, for you could not prohibit someone from an outside area coming in so long as he complied with the conditions prescribed for that area."[46]

In Conference Committee the Andresen amendment was changed to the form in which it now appear in § 8c (5) (G) of the Act. The Final Conference Report No. 1757, 74 Cong., First Sess. at p. 21 explains why the conference committee adopted the words "limit, in the case of products of milk":

> "*Amendment No. 24*: Under the House bill, no marketing agreement or order applicable to milk and its products in any marketing area could prohibit the marketing in that area of any milk or products thereof produced *in any production area* in the United States. The Senate amendment extended this provision so that no marketing agreement or order so ap-

[45] 79th Cong. Rec. 9572 (1935).
[46] Id.

plicable could limit in any manner the marketing in the marketing area of milk or its products *produced anywhere* except that certain limitations on the marketing of milk were specifically permitted. The conference agreement retains the House provision with respect to prohibitions on marketing of both milk and products of milk. The conference agreement also *denies the authority to limit* in any manner the marketing in any area of *milk products* (butter, cheese, *cream, etc.*) *produced anywhere* in the United States. The language adopted by the conference agreement does not refer to milk, and so does not negative the applicability to milk, for use in fluid form or for manufacturing purposes, of the provisions of the bill relating to milk, such as the provisions on *price* fixing, price adjustment, payments for milk, etc." (Italics ours.)

In view of the administrative purpose of §§ 927.83 and 927.84 to prevent competition between the price of pooled milk and nonpooled milk, whatever its cost, it is clear that the "compensatory charge" imposed on the latter prohibits the marketing of such products contrary to § 8c(5)(G). Indeed, this is the avowed purpose of the debated provisions. Clearly, nothing can limit market entry more effectively than a charge in the nature of a protective tariff. What else is a charge "to compensate [pool producers] for the loss of Class I fluid milk utilization and * * * protect the uniform blend price [of producers] in the marketing area"[47] if it is not a device to limit or prohibit market entry within the meaning of § 8c(5)(G)?

The Judicial Officer and the court below barely discussed § 8c(5)(G) although urged upon them by peti-

[47] 287 F. 2d at p. 730.

tioners.[48] Here, the government refers to the section only in a passing footnote (Mem. for Resp. p. 24, fn. 17) with the observation that the "argument was not asserted in the administrative proceedings, and is, therefore, not presented here. (citing cases.)"[49]

Adherence to the language, purpose, legislative history and policy of the Act would prohibit the exclusion of any milk, no matter where produced, and require competing handlers in the market to pay producers *for all milk disposed of therein* in accordance with the minimum prices established for the marketing area. That is the holding of *Kass v. Brannan*.[50] Whether such milk is "pooled" or is handled in some other way is a matter to be determined by the Secretary in accordance with the provisions of the Act.

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[48] *United States v. Lehigh Valley Cooperative Farmers, Inc.* 287 F. 2d 726 (3rd Cir. 1961), brief for appellees, p. 42.

[49] The Solicitor General said further: "It is, in any event, without merit. As Judge Learned Hand remarked, rejecting precisely this contention in his dissenting opinion in the *Kass case* (the majority of the court did not reach this issue), 'The plaintiff's argument * * * must be, that § 8c(5)(G) forbids any provision in an order, however necessary to protect a "pool", if in operation it will result in limiting the introduction of "products" into "the marketing area." I cannot believe that, when Congress decided to regulate the industry in order to assure a "uniform price" to producers, it meant by § 8c(5)(G) to forbid all protective measures, which should result in lessening the amount of "products" which without such measures would have entered the "marketing area" in question.' 196 F. 2d 791, 800. See also *Bailey Farm Dairy Co. v. Anderson*, 157 F. 2d 87, 96-97 (C. A. 8), certiorari denied, 329 U.S. 788. Moreover, the compensatory payment provisions in question are applicable to nonpool handlers generally, wherever located, and thus have no reference to milk produced in a particular geographical 'production area', as contemplated by Section 8c(5)(G)." (Mem. for Resp., p. 24, fn. 17)

[50] Not even the dissenting opinion of Judge Learned Hand disputes the proposition: "What order, short of prohibition or limitation, the Secretary might adopt to protect the new system of 'pool plants' which he had set up, it was certainly for him to say within the limits of his statutory powers. One method might have been to restore to

In *Kass*, the second circuit clearly recognized that the Secretary was authorized by § 8c of the Act to limit the entry of milk into a regulated market only to the extent that its entry would destroy the price structure in the market. *Bailey Farm Dairy Co. v. Anderson*, 157 F. 2d, 87 (8 Cir. 1946), certiorari denied, 329 U.S. 788, cited by the government, does not hold to the contrary. Neither the facts nor the regulatory provisions involved in that case are applicable here. The *Bailey* case involved an individual handler pool rather than a marketwide pool.* Hence, there was no equalization or producer settlement fund to be concerned with. The contested provision in the St. Louis Market Order required the handler of "new producer milk" to allocate it to the lowest value so long as "producer milk" milk was available in the handler's plant undisposed of for Class I purposes. § 8c(5)(D) permits "down allocation" of the milk of "new producers" entering the market for a period of 60 days, a point that will be discussed *infra*.

Where Congress has intended to control or restrict the movement or marketing of commodities by producers it has done so in clear and explicit language. Section 8c(6) of the Act relates to agricultural commodities other than milk and provides for the establishment of market orders:

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the producers in a 'pool' what they had lost by the 'non-pool' competition of each handler; but that was patently impossible to determine, and nobody suggests that it should have been attempted. Another method was to impose upon a 'non-pool" handler the same cost that 'pool' handlers must pay, thus eliminating any inducement to poach, so to say, upon the local 'pool'. The provisions in suit were promulgated to effect this purpose; and I shall assume that they can be defended only on that ground. * * *" 196 F. 2d p. 798.

*In an individual handler pool, each handler in the market pays his producers a blend price determined by the handler's useage in each class rather than the marketwide use. See § 8c(5)(B)(i).

"(A) Limiting * * * the total quantities of any such commodity * * * produced during any specified period or periods, which may be marketed in or transported to any * * * market * * *.

"(B) Allotting * * * the amount of such commodity * * * which each handler may purchase * * * on behalf of producers, during any * * * periods, under a uniform rule based upon the amounts sold by such producers, etc.".

"(C) Allotting * * * the amount of any such commodity * * * which handlers may market * * * under a uniform rule based upon the amounts which each such handler has available * * *."

Section 8c(6), in its remaining paragraphs, contains explicit direction for limitations on marketing applicable to producers and handlers alike. The provisions of this section were before Congress when it considered the order provisions applicable to milk. Regulation of marketing through the imposition of marketing quotas under the Agricultural Adjustment Act of 1938[51] was upheld by this Court as a permissible exercise of power by Congress with respect to the marketing of tobacco in *Mulford v. Smith*, 307 U.S. 38. Here the Secretary has attempted to allocate markets and restrict producers to their "traditional," "normal," or "primary" outlets without the marketing quota authority provided by § 8c(6) and contrary to the provisions of § 8c(5) (G) explicitly prohibiting such restrictions.

The government argues that the challenged compensatory payment provisions are not inconsistent with § 8c(5) (G) because "the provisions in question are applicable to non-pool handlers generally wherever located and thus have no reference to milk produced in a particular geo-

[51] 52 Stat. 31, as amended.

graphical 'production area,' as contemplated by Section 8c(5) (G)." (Mem. for Resp. p. 25.) A similar argument was made by the Judicial Officer in *Kass*.[52] The argument falls, however, when the conditions for qualifying as a "pool plant" are examined. Only a plant located in New York, New Jersey or Pennsylvania may become a "pool plant" by making certain minimum shipments of fluid milk into the marketing area. (§§ 927.25 (b), 927.26, 927.27). A plant outside of the three-state area could, theoretically, become a "temporary pool plant" (with certain limitations) if at least 55 per cent of its milk received from dairy farmers is sold in fluid form and it distributes bottled milk in the marketing area. (§ 927.29(d)). However, a plant shipping milk products (Class II under Order No. 27) such as cream or concentrated products for use in fluid form cannot qualify as a pool plant *under any conditions* if it is located outside of the three-state area of New York, New Jersey and Pennsylvania.

The effect is particularly onerous on the milk production areas of the midwest. The relative bulk and perishability of fresh whole milk has, in the past, limited its economical movement over long distances. In recent years, however, improved means of moving milk under refrigeration coupled with universal pasteurization have permitted the expansion of fluid markets for midwestern milk. While transportation costs are an important factor in the economics of milk marketing with respect to whole milk, fluid cream and other concentrated products have a higher

[52] 8 Ag. Dec. 1083, 1105: "• • • [The] only distinction in the order as to sources of milk is between milk from 'pool' plants and milk from 'non-pool' plants • • • As far as the order provisions are concerned, however, any plant anywhere can become a 'pool' by meeting the prescribed conditions."

value in relation to their volume, permitting their economical movement over longer distances. The development of methods to overcome perishability and distance in the movement of fluid milk offers a means, therefore, of permitting the milk production areas of the midwest to reach markets heretofore barred by transportation costs.[53]

Because cream and concentrated fluid milk products are often obtainable by eastern and southern handlers from midwestern sources at a price below local supplies, marketing orders are constructed to eliminate this cost advantage and to discourage regulated handlers from purchasing such products from sources outside of the production area contiguous to the regulated marketing area. This is accomplished by applying to such "other source milk" the "compensatory payment" provisions challenged here. The payment extends not only to whole fluid milk but also to "concentrated fluid milk, fluid milk products, cream [and] fluid cream products * * *" (§ 927.83(a)). If such products are obtained by handlers from "non-pool" sources, the handlers are required to pay a compensatory payment based on an amount of milk equivalent to the fluid milk milk from which the concentrated products were processed (§ 927.83(b) (2) (3)) on theory that local supplies have, to that extent, been displaced. By requiring the compensatory payment provisions of the Order to be applied to the "milk equivalents" from which the products were processed, the Order effectively removes the handler's incentive to seek lower cost supplies outside the marketing area and thereby nullifies the technological innovations that would have permitted the midwest to overcome its location disadvantage.

[53]Mathis, A. G., *The Probable Impact of Milk Concentrates on the Fluid Milk Market*, Marketing Research Report No. 208, United States Department of Agriculture, February, 1958.

2. *Section 8c(5)(D) of the Act Provides the Sole Method of Protecting the Market Structure.*

In his Findings on the amendatory decision (R. 697a, 752a-756a), the Secretary notes that a "non-pool" handler distributing small amounts of milk in the marketing area may "have a choice of either pooling his entire receipts or of paying the full compensatory payment on his sales within the marketing area" (R. 755a). However, the option is limited to "only those handlers disposing of [55 per cent] of their milk for fluid use * * *" (R. 755a).

If the foregoing alternatives are too onerous, the handler need only shift his source of supply from those "dairy farmers" with whom he has long dealt to the "producers" favored by the Order. As stated by the Secretary (R. 756a):

> "All handlers located outside the defined marketing area who sell milk in the marketing area would not be required, of course, to choose one of the alternatives heretofore described. * * * Under the accounting procedure to be employed, milk received by [non-pool] plants from pool plants will be allocated first to Class I-A milk distributed in the marketing area. Unless sales in the marketing area by the outside dealer exceeded receipts from pool sources, neither full regulation of the outside dealer nor an obligation to make compensatory payments would result."

Under the latter alternative, petitioners, in order to continue selling milk in the marketing area, would be required to shift their source of supply to the market's "pool producers," while the "dairy farmers" thus deprived of

their market would, presumably, divert their milk to manufacturing uses or seek other outlets.[54]

The contested provisions of Order No. 27 are simply devices designed to expand a market for one group of producers at the expense of the other. Their invalidity is not cured by permitting petitioners to "elect" from a choice of equally burdensome alternatives. This Court said in *Stark v. Wickard,* 321 U.S. 288, 303-304:

> "The producer is not compelled by the order to deliver * * * but neither can he be required to market elsewhere and if he finds a dealer in the area who will buy his product, the producer by delivery of milk comes within the scope of the Act and the Order. * * * The Order could not bar any qualified producers in the milk shed from selling to area handlers. * * * Upon purchase of his milk by a handler, the statute endows the producer with * * * the right to be paid a minimum price."

None would question the need for some means to protect the price structure in a marketing area from the destructive competition of unregulated milk. Under a classified price system, "the incentive is present * * * to undercut the market * * * in order to convert * * * Class III sales into Class I sales" (Mem. for Resp., p. 17). Congress made express provision "to prevent assaults upon the price structure" of a regulated market through the adoption of § 8c(5) (D) of the Act, which reads as follows:

> "Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding

[54]When the State of New York similarly attempted to restrict a handler's source of supply, this Court said: "* * * a buyer has to buy where there is a willing seller, and the peculiarities of the milk business necessitate location of a receiving and cooling station for nearby producers." *Hood & Sons v. Du Mond,* 336 U.S. 525, 540.

> the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection."

The purpose of this section, together with its relationship to § 8c(5) (G), was explained by Justice Jackson in *Hood & Sons v. Du Mond*, 336 U.S. 525. In that case the State of New York had denied Hood a permit to buy additional milk supplies from New York producers for shipment into the Boston area. The grounds for denial were to protect and advance local economic interests. New York's regulatory scheme was similar in plan and purpose to the federal Act. It contended that "* * * such restraint or obstruction as its order imposes on interstate commerce does not violate the Commerce Clause because the state regulation coincides with, supplements and is part of the federal regulatory scheme. * * *" 336 U.S. 525, 540. In rejecting this argument Justice Jackson said at pages 543-545:

> "When it is considered that the Federal Act was passed expressly to overcome 'disruption of the orderly exchange of commodities in interstate commerce' and conditions found to 'burden and obstruct the normal channels of interstate commerce,' 7 U.S.C. § 601, it seems clear that we can not sustain the State's argument that its restrictions here involved supplement and further the federal scheme.
>
> "Moreover, we can hardly assume that the challenged provisions of this order advance the federal scheme of regulation because Congress forbids in-

clusion of such a policy in a federal milk order. Section 8c(5) (G) of the act provides:

"'No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.'

"While there may be differences of opinion as to whether this authorizes the Federal Order to limit, so long as it does not prohibit, interestate shipment of milk, see *Bailey Farm Dairy Co. v. Anderson*, 157 F. 2d 87, 96; *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 221 — *a question upon which we express no opinion* — it is clear that the policy of the provision is inconsistent with the State's contention that it may, in its own interest, impose such a limitation as a coincident or supplement to federal regulation.

"*The only federal restriction of handlers' purchases from new producers, found in § 8c (5) (B)* [*sic*][55], authorizes inclusion, in orders concerning milk or milk products, of a clause providing that for deliveries made during the first sixty days a new producer shall be paid only the minimum price applicable for milk of the particular use classification, subject to adjustments not relevant here. This provision was included in the 1935 amendment, 'to prevent assaults upon the price structure by the sporadic importation of milk from new producing areas, while permitting the orderly and natural expansion of the area supplying any market * * *.' S. Rep. No. 1011, 74th Cong., 1st Sess., p. 11. And it was added, 'This is the only limitation upon the entry of new producers — wherever located — into a market, and it can remain effective only for the specified * * * period.' *Ibid.* The bill originally provided for a ninety-day minimum price

[55] § 8c(5)(D).

period but in conference the less restrictive sixty-day period was adopted. H.R. Rep. No. 1757, 74th Cong., 1st Sess., p. 21.

"The sections and reports indicate that it is the deliberate policy of the Congress to prevent federal officers from placing barriers in the way of the interstate flow of milk. * * * The purpose as expressed in § 1, 7 U.S.C. § 601, is to avoid conditions which burden and obstruct the normal channels of interstate commerce. The object of the federal program to raise and stabilize the price of products was to stimulate interstate commerce. The order of the Commissioner avows itself to have the opposite effect. It may claim neither federal sponsorship nor congressional sanction." (Emphasis supplied.)[56]

Section 8c(5) (D) is the exclusive method provided by the Act to deal with the competition of "new producers" or "other sour milk" and is wholly inconsistent with the market exclusion concept adopted by the Secretary in Order No. 27.[57]

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[56]See 79th Cong. Rec. 13022 (1935). Debates on Conf. Rep. H. R. No. 1757, 74th Cong. 1st Sess. Mr. Jones: "The provisions of this particular bill would enable that area to be protected from being swamped with fluid milk from the outside, bought at any old price. For instance, if you do not have the protection of this bill, they would run into the same trouble they ran into in the New York milk cases, where they went into New Hampshire and bought milk at a lower price and came in and broke down your milk agreements. *Under the provisions of this bill if a price was fixed in this particular area in New York, then if anyone bought milk from an outside area and brought it in he would be compelled to pay the producer the same price that was being paid the producers within the area and comply with all regulations and requirements of that area. For the first 2 months he would be required to take the manufacturer's price.*" (Emphasis supplied.)

[57]See also TNEC Monograph No. 32, *Economic Standards of Government Price Control*, (1941) p. 79:

"(3) Entrance to the market is available under the orders to any milk producer who can find a dealer to whom to sell. The law specifically states: [quoting § 8c(5)(G) of the Act].

"New producers, however, enter the market at some tempo-

II

THE COMPENSATORY PAYMENT PROVISIONS OF ORDER NO. 27 ARE CONTRARY TO § 8c(5)(A) AND, CANNOT, THEREFORE, BE AUTHORIZED BY § 8c(7)(D) OF THE ACT.

Section 8c(5) (A) of the Act provides for the fixing of prices for each use classification "which all handlers shall pay * * *." It provides further:

> "Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, * * * and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers."

Handlers pay into or withdraw from the "Producer Settlement Fund" such sums as their utilization discloses to permit them to pay producers the "blend" price "to the end that total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection." (§ 8c(5) (C).)

In *Kass v. Brannan*, 196 F. 2d 791, the Second Circuit observed that the effect of the compensatory payments required in that case: "is to add an additional cost to the original price of the non-pool milk or milk product which

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rary price disadvantage, intended to restrict the market to regular suppliers: [quoting § 8c(5)(D) of the Act].

"This appears to mean that any restriction to the entry of producers into a market *must* be found in the older form of control by the cooperative or refusal of the health authority to inspect farms or to qualify milk for sale in the market, except insofar as the payment only of low class milk prices for long periods in itself constitutes a bar to market entry." (Emphasis supplied.)

is paid by the handler, not to the seller or original producer, but to the regular suppliers of the New York market who did not deliver the milk or milk products to him." The Court held (196 F. 2d at p. 796):

> "* * * the result of the exaction of a penalty computed on the basis of the New York Class IV-A price rather than the actual cost to the handler is a price discrimination between a handler who purchases non-pool milk products and one who purchases pool milk products, although each makes the same use of such products in the New York marketing area. This in our opinion is contrary to the requirements laid down in section 8c(5) (A) that the minimum prices for each use classification shall be uniform as to all handlers."

The court below, rejecting the *Kass* reasoning and holding, stated (1): "Section 8c(5) (A) of the Act makes no reference to equalizing either fully regulated or partially regulated handlers' costs." (287 F. 2d at p. 730); (2) "Section 8c(5) (A) has no application to non-pool handlers." (287 F. 2d at p. 731); (3) "Section 8c(5) (A) * * * in no way dictates equalized costs between pool handlers or between pool and non-pool handlers." (287 F. 2d at p. 732).

In *Kass*, the court noted that "[t]he Act itself does not define 'producers' but it is clear from the context that the term refers to dairy farmers who supply the milk which the handlers market." (196 F. 2d at 795). In the case at bar, on the other hand, the court below assumed that only those "producers" defined by the Order are entitled to the benefits of the Act. Hence, the "price discrimination" between pool and non-pool handlers struck down in *Kass* was upheld by the court below as necessary to "the integrity of the regional marketing scheme" and to protect

"producers" against "loss of the Class I fluid milk utilization in the marketing area." (287 F. 2d at p. 730).

A. The Compensatory Payment Provisions of Order No. 27 Unlawfully Discriminate Among Handlers in the Marketing Area Contrary to the Provisions of Section 8c(5)(A).

During the promulgation proceedings a proposal was made that a "handler outside the marketing area be required only to pay to his producers the utilization value of milk according to the class prices established under the order" (R. 754a). This proposal was rejected by the Secretary in his amendatory decision on the grounds that:

> "The handler in the area * * * has to equalize his utilization with other handlers, and his producers are paid on the basis of a uniform price reflecting the utilization in the market as a whole rather than the utilization of his handler. It would be inequitable to a handler in the marketing area to require him to equalize his utilization while letting a handler outside the marketing area avoid equalization on milk sold in the area. *An unfair advantage would accrue to the nonpool handlers in competition for producer supplies*, and the entire program of marketwide equalization would be in jeopardy. Although it is not the purpose of the order to bring complete equality between regulated and unregulated handlers, it should at least provide equity between such handlers with respect to milk sold in the marketing area both as to class prices and as to payments to producers." (Emphasis supplied.) (R. 754a)

The government makes the same argument here when it says (Mem. for Resp., p. 13):

> "* * * the nonpool operator who has a higher ratio of Class I sales than the average in the pool would be able to outbid the pool operator in purchasing milk because he could afford to pay his farmers a price based on his own utilization of the milk."

In support of the need for compensatory payments on non-pool milk paid for at or above the class prices established under the Order, the government further argues (Mem. for Resp., pp. 15-16):

> "A basic objection to such a formula is that it would enable nonpool plants—which, in the milkshed supplying the New York - New Jersey market, operate side by side with pool plants—to outbid pool plants in buying milk. That effect is most evident in the case of a handler who pays his farmers on the basis of an individual handler pool (as do handlers, like Lehigh, subject to the Philadelphia marketing order) —*i.e.*, a blend price based on the particular handler's own utilization. Such a handler could account to his own farmers at the full Class I price for any fluid milk sold in the marketing area and thereby avoid making compensatory payments. * * *
>
> "The same would be true, though to lesser extent, of a handler who is unregulated and needs to pay his farmers simply the going market price, which would normally be * * * the New York blend price. * * * By using the New York - New Jersey market to dispose of his otherwise surplus milk * * * he could * * * increase the utilization value of that milk from the Class III price to the blend price. Combined with his Class I sales outside the marketing area, that would give him an overall utilization value greater than the marketwide pool average and thus enable him to pay more to his farmers than the New York blend price. * * *"

In substance, the foregoing arguments amount simply to this:

(1) Some handlers selling Class I milk in and out of the regulated area have a higher proportion of fluid sales than others, enabling them to return a higher price to their suppliers.

(2) The compensatory payment provisions of Order No. 27 removes that advantage and reduces the power to outbid pool handlers for producer supplies.

The promotion of orderly marketing is achieved, according to this theory, by equalizing the price received by all "producers" and "dairy farmers" who sell all or a part of their production in the same marketing area. The requirement of § 8c(5)(A) that "prices shall be uniform as to all handlers" is thus amended to require instead that "prices shall be uniform as to all 'producers' and 'dairy farmers' whose milk is sold in whole or in part in the same marketing area." It can easily be demonstrated that such a result is neither permitted by the Act nor was it intended by Congress.

The purpose of the Act is to maintain reasonable prices for milk producers by promoting orderly marketing conditions. 7 U.S.C. § 602, *United States v. Rock Royal Coop, Inc., supra.* The Act was a response to the collapse of the pricing system during the early thirties which, in turn, was attributable to the total loss of bargaining power on the part of producers. In the face of tremendous surplus and a loss of consumer purchasing power, handlers *competing in the same market* were able to force producer

prices to levels that made it impossible for them to stay in business.[58]

The *Nebbia* case established the constitutional power of a state to regulate the pricing of milk. This Court recognized, there, that unequal acquisition costs among competing handlers in a market results in "price-cutting and other forms of destructive competition" (291 U.S. at p. 518) leading finally to a deterioration in producer prices.[59] The remedy adopted by the New York legislature "as a method of correcting the evils" (291 U.S. at p. 518) was the establishment of a board with the power to fix prices to be "charged or paid for milk in any form * * *. It shall be unlawful for a milk dealer to sell or buy * * * milk at any price less or more than such price * * * whether by any discount, or rebate * * *" (291 U.S. at p. 519).

The measures adopted were designed to remove differential milk costs among *competing* handlers. Unless that

[58] *Nebbia v. New York*, 291 U.S. 502, 517.

[59] * * * "A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milkshed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor. The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (i.e., an average between the price paid the producer for milk for sale as fluid milk, and the lower surplus milk price paid by the larger organizations) can undersell the larger distributors. Indulgence in this price-cutting often compels the larger dealer to cut the price, to his own and the producer's detriment.

"Various remedies were suggested, amongst them united action by producers, the fixing of minimum prices for milk and cream by state authority, and the imposition of certain graded taxes on milk dealers proportioned *so as to equalize the cost of milk and cream to all dealers and so remove the cause of price-cutting.* (Emphasis supplied.) 291 U.S. at p. 517.

were done, the "disorderly marketing conditions" that the New York act was designed to deal with would have continued unabated, frustrating the purpose of the law.[60]

Classified pricing under state regulation failed when this Court held in *Baldwin v. Seelig*, 294 U.S. 511, that New York was powerless to exclude from its market "milk paid for in Vermont below the New York minimum" (294 U.S. at p. 524). Because of that limitation on state power, Congress legislated to accomplish the same objectives sought by New York[61] and other states.

Sections 8c(5)(A), (B) and (C) provide the method for assuring "that the total sums paid by each handler shall equal the value of the millk purchased by him at the prices fixed in accordance with" the Act. It is the uniformity of price *paid by handlers competing for the same business*, not the price received by producers, that stabilizes the market and removes the handler's incentive to cut the producer's price.

The Act does not attempt to equalize returns for all producers in the market as the government argues here. Section 8c(5)(B), for example, provides for location and other differentials borne by the producer not the handler.[62]

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[60] *Nebbia v. New York*, supra, at p. 530.

[61] *United States v. Rock Royal Coop, Inc.*, 307 U.S. at p. 549: • • • "A later New York act, the Rogers-Allen Act, authorized the state commissioner to cooperate with the federal authorities acting under the present Marketing Agreement Act, and to issue orders supplementary to those of the Federal Government to be carried out under joint administration."

[62] "The purpose of the [location] differentials is to make it possible for handlers to procure milk throughout the supply area at a delivered cost that is uniform with that of other handlers." See fn. 23 *supra*.

Nor is it the purpose of the Act to eliminate differential returns to producers arising from different marketing practices of their handlers. In *United States v. Rock Royal Coop, Inc., supra,* this Court rejected the argument that the government urges here, stating (307 U.S. at p. 566):

> * * * "It is erroneous to suppose that by buying some milk at less than the minimum, the 'actual price' paid for milk sold in the marketing area is reduced. The price paid for all milk sold by proprietary handlers in that area is the uniform price. Unpriced milk from the same producer may be bought for less. The average paid the producer may be below the minimum *but for the part sold in the marketing area or passing through plants there located* the minimum is paid." (Emphasis added)

Here, as in *Rock Royal,* dairy farmers supplying petitioners may indeed receive a higher return for their milk than the "pool producers" regulated under Order No. 27. That, however, "is a competitive situation which the Order did not create and with which it does not deal" (307 U.S. at p. 566). Here the government seeks to accomplish precisely what this Court rejected in *Rock Royal* as outside of the purpose of the Act.

That a handler may be able to pay his producers *more* than the minimum Order price cannot impair or frustrate the "effectiveness of the regulatory scheme" (Mem. for Resp., p. 13). There is nothing in the Act to bar a "producer [from selling] to the handler for any price above the minimum." *Stark v. Wickard,* 321 U.S. 288, 303. In fact, the Act itself permits differential pricing to producers supplying handlers under the same order. Section 8c(5)(F) provides:

> "Nothing * * * in this subsection is intended or shall be construed to prevent a cooperative marketing

> association * * * engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers * * *."

The section applies to a cooperative in its capacity as handler in the market. The effect of the provision is to virtually assure a lack of uniformity in the "uniform price" received by "producers" in Order No. 27. "Producers" supplying proprietary handlers receive the "uniform price" established by the Order. Neighboring "producers" who are members of cooperative A might receive a different price, while still other "producers," who are members of cooperative B, could receive yet another price—"in accordance with the contract between the association and its producers."[63]

While the price received by producer-members of a cooperative may vary from the "uniform price," cooperative handlers competing in the same market with other handlers, "equalize their purchases by payments into the producer settlement fund, even though they are not required to pay the uniform price to their producers * * *" (*United States v. Rock Royal Coop, Inc.*, 307 U.S. at p. 579). By requiring the cooperative handler to account to the equalization pool in accordance with the amount of milk that it has disposed of in each class, "equality of cost"

[63]See *United States v. Rock Royal Coop, Inc., supra* at p. 561, 565: "The cooperative member measures his return by the market or uniform price the business handler pays. * * * If distributions do not equal open prices, the cooperator's reactions would parallel those of stockholders of losing businesses. Neither the Act nor the order protects anyone from lawful competition, nor is it essential that they should do so."

among competing handlers is maintained and the "cause of price-cutting" and unstable marketing conditions (*Nebbia v. New York, supra*) is removed.

B. The Compensatory Payment Provisions of the Order Are Not Authorized by Section 8c(7)(D).

As already noted, orders issued pursuant to the Act may contain only the "terms and conditions provided by § 8c(5), "and (except as provided in [§ 8c(7) (D)]) no others." The government does not attempt to argue that authority for the challenged regulations is found in § 8c(5) or any of its subdivisions.[64]

Section 8c(7) (D) authorizes inclusion in milk orders of provisions: "Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) - (7) of this section and necessary to effectuate the other provisions of such order." If the compensatory payment provisions of Order No. 27 are contrary to any of the paragraphs of § 8c(5), then they are necessarily inconsistent with the terms and conditions specified in that subsection. The government would avoid that result by simply withdrawing "non-pool handlers" from the provisions of § 8c(5) and by discovering a source of regulatory power in § 8c(7) (D) applicable only to handlers of outside milk. The government argues, "the compensatory payment provisions, being applicable only to handlers who are not subject to the pooling provisions specified in Section 8c(5), cannot be 'inconsistent' with those pro-

[64] "* * * Section 8c(5)(A) is neither the source of the authority for, nor in any way concerned with the terms of, the incidental regulation of handlers who are not subject to the pooling requirements of the order. The source of that regulation is instead Section 8c(7)(D) * * *" (Mem. for Resp., p. 23).

visions and, being necessary to prevent the purposes of the pooling provisions from being undermined by the unregulated competition of non-pool handlers are 'necessary to effectuate' the pooling provisions. Hence, as the court below concluded, they are fully authorized by Section 8c(7) (D)." As we show below, the argument is a clear *non sequitur.* (Mem. For Resp., p. 24).

1. *The Compensatory Payment Provisions of Order No. 27 Are Neither Incidental To Nor Consistent With the Terms and Conditions Authorized by the Act.*

Section 8c(7) (D) is intended only to provide administrative flexibility by permitting the Secretary "to include provisions auxiliary to those definitely specified." *United States v. Rock Royal Coop., Inc.*, 307 U.S. at p. 576. The "incidental" power of the Secretary to include provisions not specifically granted by § 8c(5) was fully considered by this Court in *Brannan v. Stark*, 342 U.S. 451. There, the Secretary had included a provision in the Boston milk order authorizing a deduction to be made from the pool to provide "market service payments" to cooperatives alone. The deductions reduced the uniform price that could be paid to all producers. The Secretary claimed that § 8c(7) (D) authorized the provision. In holding the challenged provisions unauthorized by § 8c(7) (D), this Court said (342 U.S. at p. 462):

> * * * "We note at the outset that § 8c(5) states in specific and lengthy detail the provisions which may be included in milk marketing orders. That subsection lays down comprehensive directions for classification, pricing, and the operation of the equalization pool mechanism, particularly as to adjustments and

> deductions employed in determining the blended price. * * * Section 8c(7) authorizes a congeries of general terms which may be included in all marketing orders, including those dealing with commodities other than milk and milk products. * * * it is claimed that the contested provisions are of such basic importance that their validity may be crucial to the success of the whole milk marketing program. We do not think it likely that Congress, in fashioning this intricate marketing order machinery, would thus hang one of the main gears on the tail pipe. * * *
>
> "The payments * * * are inconsistent with § 8c(5)(A), which provides that all handlers shall pay uniform prices for each class of milk, subject to certain adjustments * * *."

To insist, as the government has here, that the compensatory payment provisions are essential to the "effectiveness of the regulatory scheme" or to argue, as did the court below, that their removal from the Order "would impair the integrity of the regional marketing scheme" (287 F. 2d at p. 730) or "[stifle] the effectiveness of the whole plan" (287 F. 2d at p. 731) hardly accords with the incidental authority of § 8c(7) (D) described by this Court in *Brannan v. Stark, supra.* For here, as in *Stark*, it is unlikely "that Congress, in fashioning this intricate marketing order machinery," intended that the administrator should "hang one of the main gears on the tail pipe."[65]

In *F.P.C. v. Panhandle Eastern Pipeline Co.*, 337 U.S. 498, this Court considered the "incidental powers" of the Commission to do all things appropriate to carry out the

[65] "Certainly an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted." *First National Bank v. Missouri*, 263 U.S. 640, 659."

purposes of the Federal Power Commission Act. The F.P.C. is given broad powers over the "transportation or sale of natural gas subject to the jurisdiction of the Commission," (337 U.S. at p. 508). The Commission argued that it had the power to approve or disapprove transfer of certain leases over natural gas reserves owned by Panhandle. Extensive administrative findings were made that since natural gas is the "lifeblood" of a pipeline system, a company could, by disposing of its reserves, render itself unable to continue service and this without the Commission's consent. The Court held that this alleged necessity of protecting the Commission's grant of authority was no substitute for the failure of Congress to grant additional authority (337 U.S. at pp. 515-516):

> "If the Commission is of the opinion that it should have the power to control the disposition of leases by natural gas companies, it is authorized to call the attention of Congress to that fact."

Similarly, in *F.T.C. v. Bunte*, 312 U.S. 349, the statute gave the F.T.C. authority over unfair competition in interstate commerce. It was argued that certain intrastate sales which "affect" interstate commerce must also thereby be deemed subject to F.T.C. jurisdiction because the Commission had found that such sales enabled persons "in the Illinois market to compete unfairly with manufacturers outside of Illinois." The Commission urged "that it may also proscribe unfair methods used in intrastate sales when these result in a handicap to interstate competitors." In denying the Commission such power, this Court said (312 U.S. at p. 355):

> "This case presents the narrow question of what Congress did, not what it could do."

Here, too, it is argued that "producers" must have market protection against loss of Class I sales by imposing a charge against the milk of "dairy farmers who are not producers." Congress not only withheld such authority; it adopted § 8c(5)(G) to guard expressly against the danger that such power would be assumed.

2. *The Challenged Provisions Are Not Necessary to Effectuate the Other Provisions of the Order.*

The government and the court below contend that the challenged provisions of the order are necessary to prevent the destructive competition of unregulated milk and to retain a market for the area's "producers." While arguing, on the one hand, that the provisions are "necessary to effectuate the essential purpose" of the Act and the Order, it is asserted, on the other hand, that the provisions are merely "ancillary" to other authorized provisions for pooling and pricing.

It is a sufficient answer to the claimed "necessity" that the Act operated for eight years without the challenged payment provisions and the Secretary has not found it necessary to include such provisions in many orders now in effect. (Mem. for Resp. p. 16).

It is also claimed that the "partial regulation" of non-pool handlers through the device of compensatory payments is the only method available to the Secretary to protect the pool while at the same time permitting non-pool handlers to continue to do a small part of their business in the marketing area. (Mem. for Resp. p. 13). The alternative, according to the court below (287 F. 2d at 731), and the government (Mem. for Resp. p. 14) is full regula-

tion of all of petitioners sales, or no regulation at all. The latter, it is argued, would destroy the price structure in the market by permitting entry of "cheap milk" bought from unregulated sources. Full regulation would subject petitioners to equalization payment on *all* their fluid sales though selling only about 5 per cent of their milk in the marketing area. The burden of such payments would disable petitioners from competing with other handlers in the unregulated areas where they do most of their business. The government and the court below assert that *Titusville Dairy Products Co v. Brannan*, 176 F. 2d 332 (3d Cir.), certiorari denied, 338 U.S. 905, authorizes such full regulation under Order No. 27 on sales made outside the marketing.

In *Rock Royal and Hood*, cited *supra*, the Secretary never attempted to regulate milk sold outside of the marketing area. Such milk, though from the same producer or production area, was "unpriced" and was not included in the computation of the uniform price. (307 U.S. 533, 564). The Act provides the mechanism for the pricing and pooling of all milk sold in the marketing area including the sales made here by petitioners. The Act regulates handlers *with respect to milk sold in a regulated area*. The Secretary is permitted to issue an order fixing prices whenever he finds "that the parity prices of [milk] are not reasonable in view of * * * the economic conditions which affect market supply and demand for milk * * * *in the marketing area to which the contemplated* * * * *order* * * * *relates*" (emphasis supplied) (§ 8c(18).) How can the need for regulation in New York or a part of New Jersey justify an exercise of the same regulatory power in Delaware or Pennsylvania, absent a determina-

tion by the Secretary that economic conditions in those areas also require issuance of a marketing order?

The claimed authority, based upon the *Titusville Dairy* case, cited *supra*, is wholly without statutory support. The case is no authority for the claimed power of the administrator of Order No. 27 to regulate a handler with respect to milk sold outside of the area. The Order defined Titusville as a handler because it held a health department permit. Having accepted the benefits of the Order by withdrawing equalization payments, and having failed to challenge the 1941 amendment regulating the milk of handlers "wherever sold," the court determined only that *Titusville* could not accept the Order's benefits without sharing its burdens.[66]

III

THE CHALLENGED PROVISIONS BURDEN AND OBSTRUCT THE CHANNELS OF INTERSTATE TRADE AND CONFLICT WITH ANTITRUST POLICY

Congress has not deemed strict application of the antitrust laws appropriate to our agricultural economy. When demand for agricultural commodities falls off or when over-expansion of productive facilities gluts the market and depresses prices, equitable balance is not readily reestablished, in the absence of government intervention,

[66]As a handler Titusville had collected from the producer settlement fund more than $55,000 (176 F. 2d at p. 334). The court did not consider the status of "handlers" not approved by the New York Health Department but qualified by United States Public Health Service and Department of Agriculture approval to supply federal installations in the marketing area; nor did it consider whether the refusal of the New York Department of Health to approve a dealer could affect his "right" to sell milk in the marketing area. See *Dean Milk Co. v. City of Madison*, 340 U.S. 349.

without extreme hardship and serious dislocation to the farm population.[67] The Agricultural Marketing Agreement Act of 1937 is one of the measures provided by government to strengthen the dairy farmers' bargaining position and maintain prices at reasonable levels. Faced with the superior organization and market power of handlers, milk producers bore the brunt of the competitive efforts of handlers to maintain their market in the face of low demand. The Act was adopted to permit handlers and producers to fix prices in a market area under public supervision. Such marketing agreements (§ 8b) were by the terms of that section granted immunity from the anti-trust laws when adopted in accordance with the terms of the Act. Upon the adoption of a marketing agreement fixing prices in a regulated area, the Act provided that the Secretary should issue a marketing order if favored by producers (§ 8c(8)). In practice, however, orders are issued without marketing agreements in accordance with the provisions of § 8c(9).

The decision below and the arguments of the government here are an attempt to extend the Act beyond its permissible limits. The decision and the arguments are based upon a separation of milk producers into "producers" and "dairy farmers who are not producers," pre-empting to the former all of the fluid milk business in the regulated area. The avowed purpose of §§ 927.83 and 927.84 is to grant "producers" under the Order the exclusive right to all of the Class I sales of milk in the marketing area. The dairy farmers thus foreclosed are required either to divert their milk to manufacturing uses or to seek outlets in

[67]See Johnson, Gale D., *Government and Agriculture: Is Agriculture a Special Case?* 1 J. of Law and Economics, (1958) p. 122.

other areas. The challenged provisions in effect grant "producers" a "full supply contract" tied to a classified price plan for all of the milk sales in the regulated area.[68] While the Act permits the latter, nowhere does it authorize the former.

Unless otherwise authorized by law, exclusive dealing or exclusive supply arrangements which foreclose competitors from any substantial market are unreasonable per se and constitute an unlawful restraint of trade. *Standard Oil Co. of California v. United States*, 337 U.S. 293. In the *Standard Oil* case, it was observed that such contracts may often be beneficial to the buyer, the seller and the consuming public. (337 U.S. at p. 309.) However, if established suppliers grow stronger through such contracts and late-comers are prohibited from entering the market:

> "* * * it would seem unimportant that a short-run by-product of stability may have been greater efficiency and lower costs, for it is the theory of the antitrust laws that the long-run advantage of the community depends upon the removal of restraints upon competition" (337 U.S. at p. 309).

Recently this Court held that a cooperative association of milk producers which had acquired distribution facilities for the purpose of foreclosing a market to other producers violated § 3 of the Sherman Act and § 7 of the Clayton Act. *Maryland and Virginia Milk Producers Association, Inc. v. United States*, 362 U.S. 458. The government's complaint under § 7 of the Clayton Act charged the Association with acquiring an independent dairy in order to:

[68]See, *United States v. Maryland & Virginia Milk Producers Assn. Inc.*, 90 F. Supp. 681.

> "eliminate the largest purchaser of non-Association milk in the area; force former Embassy non-Association producers either to join the Association or to ship to [another market], thus both bringing more milk to the Association and diverting competing milk to another market; eliminate the Association's prime competitive dealer from government contract bidding; and increase the Association's control of the Washington market." (362 U.S. at p. 469.)

By eliminating the competitor and diverting competing milk to another market, the Association hoped to eliminate "Embassy's price cutting and its generally 'disruptive' competitive practices that had made Embassy a 'thorn in the side of the Association for many years.'" (362 U.S. at p. 470.)

While § 8b of the Act exempts from the coverage of the antitrust laws authorized marketing agreements entered into under the Act, Congress did not intend wholly to immunize the marketing of milk from those laws. *United States v. Borden Co.*, 308 U.S. 188. In the *Borden* case it was claimed that the Act had destroyed the applicability of the Sherman Act to the marketing of agricultural commodities. But this Court said (308 U.S. at p. 198):

> "While effect is expressly given * * * to agreements and orders which may validly be made by the Secretary * * * there is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they contain, the commerce in agricultural commodities is stripped of the safeguards set up by the Anti-Trust Act * * *. We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan."

The only price fixing and market exclusion devices permitted by the Act are those contained in §§ 8c(5)(A) and 8c(5)(D). The Act permits the Secretary to include in a milk order the terms and conditions authorized by § 8c(5) and "no others" except "incidental" terms and conditions necessary to "effectuate the other provisions" of the Order.

The power to accomplish a purpose uniformly condemned as contrary to public policy cannot be characterized as "incidental." Congress has granted milk producers and handlers the right to enter into price fixing agreements without running afoul of § 1 of the Sherman Act. The court below and the government would now extend that immunity to include arrangements prohibited by § 3 of the Sherman Act and § 7 of the Clayton Act. In *Associated Industries of New York v. Ickes*, 134 F. 2d 694 (2d Cir.), dismissed as moot 320 U.S. 707, the court said (at p. 705):

> "* * * the common law has always zealously regarded competition as inherently desirable. And Congress has usually reinforced that policy legislatively, as manifested in the Anti-Trust laws, except in unusual circumstances such as those which induced the passage of the [Bituminous Coal Act of 1937]; since such a statute is patently an exception, it should surely be construed, if possible, in such a way as not to blot out all protection to consumers. As respondents themselves freely acknowledge in their briefs, several sections of the Act show that Congress (recognizing that this legislation was granting immunity to coal producers from the provisions of the Anti-Trust Laws) was bent on giving adequate offsetting protection to consumers. Thus § 4 II(a) provides that minimum prices proposed as a basis for co-ordination 'shall have due regard to the interests

of the consuming public,' and § 4 II(c) refers to protection of 'the consumer of coal against unreasonably high prices therefor.' "

A similar protection is afforded the public interest by § 2[69] of the Agricultural Marketing Agreement Act. It should not be eroded by extending provisions of the Act to permit the foreclosure of markets to qualified producers.

CONCLUSION

Restrictions and limitations inhere in all economic regulatory measures. The question is: what limitations, what restrictions does the law permit? The Secretary may neither achieve ends that the Act forbids, nor may he employ unauthorized means to accomplish its legitimate objectives.

The sole statutory basis for the challenged provisions is asserted by the government and the court below to rest in § 8c(7)(D). The exclusionary provisions, it is claimed, are necessary for the administration of the Act. This court has recently held that administrative necessity cannot authorize an exercise of power withheld by Congress. *Denver Union Stock Yard Co. v. Producers Livestock Marketing Association*, 356 U.S. 282, 298. There, the Court struck

[69] "It is declared to be the policy of Congress—

"(1) • • •

"(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of the section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section."

down regulations sanctioned by the Secretary of Agriculture under the Packer and Stockyard Act, 7 U.S.C. § 181 et seq. The regulations complained of gave the Denver Stockyard Company a monopoly in the marketing of all livestock produced "within the normal marketing area" of the Denver yard. This Court found that the plain words of the Act prohibited the discriminatory regulations that would have permitted stockyard owners to compel marketing agencies to enter into exclusive dealing arrangements, stating "[i]f the Act does not fit the present economics of the business, a problem is presented for the Congress."

The challenged provisions of Order No. 27 are designed, avowedly, to exclude from the market "outside producers." Sec. 8b exempts from the coverage of the antitrust laws *authorized* marketing agreements entered into under the Act, but the narrow price fixing and market exclusion devices permitted by §§ 8c(5)(A) and 8c(5)(D) should not be permitted, by an arrogation of power, to be extended to accomplish a purpose uniformly condemned as contrary to public policy.

For the foregoing reasons the State of Minnesota urges that the decision of the court below be reversed and that the compensatory payment provisions of Order No. 27 be declared unauthorized by the Act.

Respectfully submitted,

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